Layar Baiduri Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO PA-24NCvC-387–04 OF 2019
AMARJEET SINGH JC
4 JULY 2019

Civil Procedure — Stay of proceedings — Application for — Plaintiff applied for stay until determination of appeal to Special Commissioner of Income Tax — Whether court could exercise inherent jurisdiction — Whether there were special circumstances warranting grant of stay — Whether stay contrary to the Income Tax Act 1967 — Whether grounds advanced by the plaintiff did not satisfy the special circumstances test — Whether court entitled to restrain impugned decision of director general of inland revenue — Rules of Court 2012, 0 92 r 4

This was an application by the plaintiff by way of an originating summon pursuant to O 92 r 4 of the Rules of Court 2012 sought for reliefs as follows: (a) a declaration that the Director General Of Inland Revenue ('DGIR') decision ('the impugned decision') dated 9 April 2019 stayed until full and final determination of the plaintiff's appeal to the Special Commissioner of Income Tax ('the commissioner'); (b) an order that the effect and enforcement of the impugned decision stayed until the said determination; and (c) an interim order restraining the director general of inland revenue from enforcing the impugned decision until the said determination. The impugned decision consisted of a notification of non-chargeability of the year of assessment 2014, the notice of assessment for the year of 2015 and the notice of additional assessment for the year of 2016. It is established law that upon service of such notices, the amount of tax assessed in the aid notices becomes due and payable and must be paid whether or not the taxpayer had appealed against the assessment to the commissioner. The plaintiff filed an appeal to the commissioner under s 99 of the Income Tax 1967 ('the ITA') and that appeal was pending. The plaintiff contended that the court had inherent power under O 92 r 4 to grant the stay. The plaintiff argued that: (i) the court had inherent powers under o 92 r 4 to grant the stay; (ii) the grounds advanced had satisfied the special circumstances test for the stay to be granted; (iii) s 29(1) of the Government Proceeding Act 1956 did not bar the grant of an interim injunction against the DGIR. On the other hand, the DGIR contended that: (1) the stay was contrary to the express provision of the ITA; and (2) the grounds advanced by the plaintiff did not satisfy the special circumstances test.

Held, dismissing the application with costs:

(1) The inherent power in O 92 r 4 was intended to prevent injustice or abuse of process of High Court. The rule was part of procedural law could not override substantive law. The stay sought would override substantive provisions of the ITA triggered by the non-payment of tax by the plaintiff. The inherent power sought was for all intent and purposes to override substantive law which was not within the ambit and scope of O 92 r 4 of the ROC. The High Court had inherent powers to suspend the operation or execution of any order made by an inferior court or tribunal pending the decision on the validity of the said order by the High Court. The principle in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 did not apply to the case. The court was not deciding the question of the validity of the assessment made in the impugned decision. As it was, the jurisdiction to decide on the validity of the impugned decision was that of the special commissioner (see paras 12, 16 & 23–24).

(2) The grounds advanced by the plaintiff did not amount to special circumstances warranting a stay of execution of the impugned decision. The merits of a case was not a relevant consideration in granting a stay. The allegation that the assessment was arbitrary and incorrect as for the special commissioner and concerned the merits of the case. Therefore, it was unnecessary for the court to consider the merits of the plaintiff's case (see paras 26 & 29).

(3) The hardship advanced by the plaintiff was nothing unusual. Special circumstances must be special and must go to the execution of an order. Ordinary or usual circumstances were insufficient. The entity in respect of whom the tax was collected was the government of Malaysia. There was no danger of the plaintiff not being repaid if it was successful in its appeal. The tax regime applied to all taxpayers alike and if grounds of hardships were a reason to grant a stay, then the tax regime and the collection of tax would be disrupted and would be against the interest of the public at large. In the circumstances, the plaintiff had failed to furnish any valid ground that warranted the granting of stay and the question of balance of interest did not arise. The court was of the view that the plaintiff had not succeeded in establishing the existence of special circumstances in support of the application which had to be dismissed with costs (see paras 31 & 33–35).

(4) It was found that the DGIR had no role whatsoever in the recovery modes provided in ss 75A, 103 and 106 and therefore, no order could be made to restrain him. It was of the considered view that the DGIR and by extension the government could not be restrained by an interim injunction in view of the provision of s 29 of the Government Proceedings Act 1956. The government through its agent, the Director

A General of Inland Revenue, could not be restrained from exercising the power under s 106 of the Income Tax Act to recover tax (see paras 38, 43 & 48).

[Bahasa Malaysia summary

B Ini adalah permohonan oleh plaintif melalui saman pemula menurut A 92 k 4 Kaedah-Kaedah Mahkamah 2012 memohon relif-relif seperti berikut: (a) perisytiharan bahawa keputusan Ketua Pengarah Hasil Dalam Negeri ('DGIR') ('keputusan yang dibantah') bertarikh 9 April 2019 digantungkan sehingga keputusan muktamad dan akhir rayuan plaintif kepada Suruhanjaya C Khas Cukai Pendapatan ('Suruhanjaya tersebut'); (b) suatu perintah bahawa kesan dan penguatkuasaan keputusan yang dibantah digantung sehingga keputusan rayuan tersebut; dan (c) suatu perintah interim yang menghalang ketua pengarah hasil dalam negeri dari menguatkuasakan keputusan yang D dibantah sehingga keputusan rayuan tersebut. Keputusan yang dibantah tersebut terdiri daripada hebahan tidak boleh dikenakan cukai tahun taksiran 2014, hebahan taksiran untuk tahun 2015 dan hebahan taksiran tambahan untuk tahun 2016. Ianya adalah undang-undang yang mantap bahawa setelah penyerahan hebahan tersebut, jumlah cukai yang ditaksir berdasarkan hebahan E tersebut menjadi kena bayar dan perlu dibayar dan mesti dibayar sama ada pembayar cukai telah membuat rayuan terhadap taksiran tersebut kepada Suruhanjaya. Plaintif memfailkan rayuan kepada Suruhanjaya tersebut di bawah s 99 Akta Cukai Pendapatan 1967 ('Akta tersebut') dan rayuan itu masih belum selesai. Plaintif menghujahkan bahawa mahkamah mempunyai kuasa F semulajadinya di bawah A 92 k 4 untuk membenarkan penggantungan tersebut. Plaintif berpendapat bahawa: (i) mahkamah mempunyai kuasa semulajadi di bawah A 92 k 4 untuk membenarkan penggantungan; (ii) alasan yang dikemukakan telah memenuhi ujian keadaan khas untuk membenarkan penggantungan; dan (iii) s 29(1) Akta Prosiding Kerajaan 1956 tidak G menghalang perintah penggantungan interim terhadap DGIR dibenarkan. Sebaliknya, DGIR berpendapat bahawa: (1) penggantungan tersebut adalah bertentangan dengan peruntukan jelas Akta tersebut; dan (2) alasan yang dikemukakan oleh plaintif tidak memenuhi ujian keadaan khas.

H **Diputuskan**, menolak permohonan dengan kos:

(1) Kuasa semulajadi dalam A 92 k 4 adalah berniat untuk menghalang ketidakadilan atau penyalahgunaan proses Mahkamah Tinggi. Aturan tersebut adalah sebahagian dari undang-undang prosedural tidak boleh mengatasi undang-undang substantif. Perintah penggantungan yang I dipohon akan mengatasi peruntukan substansif Akta tersebut yang bermula apabila plaintif tidak membayar cukai. Kuasa semulajadi yang dipohon adalah untuk semua maksud dan tujuan untuk mengatasi undang-undang substantif yang tidak termasuk dalam lingkup dan skop A 92 k 4 KKM. Mahkamah Tinggi memiliki kuasa semulajadi untuk

menggantung operasi atau pelaksanaan apa jua perintah yang dibuat oleh mahkamah rendah atau tribunal menunggu keputusan mengenai keesahan perintah tersebut oleh Mahkamah Tinggi. Prinsip dalam *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 tidak terpakai untuk kes semasa. Mahkamah tidak memutuskan persoalan keesahan taksiran yang dibuat dalam keputusan yang dibantah tersebut. Adalah ianya, bidang kuasa untuk memutuskan keesahan keputusan yang dibantah tersebut adalah oleh suruhanjaya khas (lihat perenggan 12, 16 & 23–24).

(2) Alasan yang dikemukakan oleh plaintif tidak membawa kepada keadaan istimewa yang menjamin penggantungan pelaksanaan keputusan yang dibantah tersebut. Merit sesuatu kes bukanlah pertimbangan yang wajar dalam membenarkan penggantungan. Dakwaan bahawa taksiran tersebut dibuat dengan sewenang-wenangnya dan tidak tepat bagi Suruhanjaya Khas dan berkaitan dengan merit kes. Oleh itu, tidak wajar bagi mahkamah untuk mempertimbangkan merit kes plaintif (lihat perenggan 26 & 29).

(3) Kesusahan yang dialami oleh plaintif bukanlah sesuatu yang luar biasa. Keadaan khas mestilah istimewa dan mestilah selari dengan perlaksanaan perintah tersebut. Keadaan biasa atau lazim tidak mencukupi. Entiti berkenaan dengan mana cukai tersebut dipungut adalah kerajaan Malaysia. Tidak ada bahaya kepada plaintif sekiranya ianya tidak akan dilunaskan jika berjaya dalam rayuannya. Peraturan cukai terpakai kepada semua pembayar cukai dan sekiranya alasan kesulitan adalah alasan untuk membenarkan penggantungan, maka peraturan cukai dan pengumpulan cukai akan terganggu dan akan bertentangan dengan kepentingan umum. Dalam keadaan seperti itu, planntif telah gagal memberikan alasan yang sah untuk membenarkan penggantungan dan persoalan keseimbangan kepentingan tidak timbul. Mahkamah berpendapat bahawa plaintif tidak berjaya membuktikan wujudnya keadaan khas untuk menyokong permohonan yang harus ditolak dengan kos (lihat perenggan 31 & 33–35).

(4) Ianya telah didapatkan bahawa DGIR tidak mempunyai peranan dalam mod pengambilan semula seperti yang diperuntukan dalam ss 75A, 103 dan 106 dan oleh itu, tidak ada perintah yang boleh dibuat untuk menghalang beliau. Ianya adalah dapatan yang diputuskan bahawa DGIR dan secara luasnya kerajaan tidak dapat dihalang oleh perintah injunksi interim berdasarkan kepada peruntukan s 29 Akta Prosiding Kerajaan 1956. Pemerintah melalui ejennya, Ketua Pengarah Hasil Dalam Negeri, tidak dapat dihalang dari menggunakan kuasanya di bawah s 106 Akta Cukai Pendapatan untuk mendapatkan kembali cukai (lihat perenggan 38, 43 & 48).]

Cases referred to

Ambank (M) Sdn Bhd v Metal Reclamation (Industries) Sdn Bhd & Ors [2016] 10 CLJ 205, HC (refd)

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533; [1988] 1 CLJ Rep 384 (refd)

China Harbour Engineering Company Ltd v Lunar Shipping Agencies Sdn Bhd [2016] MLJU 1252; [2016] 1 LNS 1393, HC (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473, SC (refd)

Government of Malaysia v Margaret Au Nyat Fah [2007] MLJU 608; [2008] 3 CLJ 424, HC (distd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105, SC (refd)

Kerajaan Malaysia v Raja a/l K Veerasamy (2014) MSTC 30-074 (refd)

Klassik Tropika Development Sdn Bhd v Lembaga Rayuan Negeri Pulau Pinang & Ors [2016] MLJU 707, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee) [1990] 1 MLJ 445, HC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49, CA (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601; [1994] 2 CLJ 705, SC (distd)

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325, CA (refd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)

Sibu Slipway Sdn Bhd v Yii Chee Ming & Ors and other appeals [2017] 1 MLJ 368, CA (distd)

Smith and others v Inner London Education Authority [1978] 1 All ER 411, CA (refd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (folld)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676, CA (folld)

Federal Commissioner of Taxation v Palumbo (1992) 92 ATC 4358, SC (refd)

Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133, CA (refd)

Legislation referred to

Federal Court 1995 r 137
Income Tax Act 1967 ss 99, 75A, 103, 104, 106
Inland Revenue Board of Malaysia Act 1995 s 29
Rules of Court 2012 O 92 r 4
Specific Relief Act 1950 s 50

DP Naban (Chris Toh with him) (Lee Hishammuddin Allen & Gledhill) for the applicant.
Norhisham Ahmad (Altunnidollah Idrus and Aina Abdullah with him)(Lembaga Hasil Dalam Negeri, Cyberjaya) for the respondent.

Amarjeet Singh JC:

BACKGROUND

[1] The plaintiff by way of an originating summons is moving this court pursuant to O 92 r 4 of the Rules of Court 2012 ('O 92 r 4') for the following reliefs:

(a) a declaration that the Director General of Inland Revenue's ('DGIR') decision dated 9 April 2019 ('the impugned decision') be stayed until full and final determination of the plaintiff's appeal to the Special Commissioners of Income Tax ('Special Commissioners');

(b) an order that the effect and enforcement of the impugned decision be stayed until the said determination; and

(c) an interim order restraining the DGIR from enforcing the decision until the said determination.

[2] The impugned decision consists of: (1) a notification of non-chargeability for the year of assessment 2014; (2) the notice of assessment for the year 2015; and (3) the notice of additional assessment for the year 2016.

[3] It is established law that upon service of such notices the amount of tax assessed in the said notices becomes due and payable and must be paid whether or not the taxpayer has appealed against the assessment to the special commissioners (*Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235; *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163).

[4] The plaintiff has filed an appeal to the special commissioners under s 99 of the Income Tax Act 1967 ('the ITA') and that appeal is pending. Thus, the determination as to whether the assessments are right or wrong is within the jurisdiction of the special commissioners.

[5] The failure to pay the tax stated in the notices within the specified date would trigger certain statutory provisions of the ITA. Section 103 charges penalties by way of tax increment for late payment or non-payment. Section 75A imposes liability on a director, jointly and severally with the company, if such tax has not been paid by the company on specified date. Section 106 empowers the government to enforce the recovery of the tax in civil proceedings as a debt due to the government while s 104 empowers the DGIR to impose a travelling ban, if in his opinion, a person is about or likely to leave Malaysia without paying tax that is due and payable by him.

[6] The plaintiff has not paid the tax due and payable and is now moving this court against the DGIR for an order of stay to suspend the enforcement of the recovery of the tax pending the determination of the plaintiff's appeal. The terms of the stay as framed in the originating summons shows that the stay which the plaintiff seeks is an interim stay.

[7] The plaintiff advanced the following arguments in support of its application:

(a) this court has inherent power under O 92 r 4 to grant the stay;

(b) the grounds advanced to support the stay has satisfied the special circumstances test for the stay to be granted; and

(c) sub-s (1) of s 29 of the Government Proceedings Act 1956 does not bar the grant of an interim injunction against the DGIR.

[8] The DGIR, on the other hand contends that the stay is contrary to the express provisions of the ITA and as such the inherent power cannot be invoked to defeat substantive provisions enacted by Parliament. The DGIR also contends that the grounds advanced by the plaintiff do not satisfy the special circumstances test and prays that the application be dismissed.

DECISION OF THE COURT

First point: Inherent power under O 92 r 4

[9] In support of the application for the declaration, the plaintiff endeavoured to show that the courts have invoked the inherent power under O 92 r 4 and granted stay in the absence of express statutory provisions.

[10] The starting point to address this argument would therefore be the interpretation that has been given to O 92 r 4. In this regard I am assisted by the interpretation given to r 137 of the Federal Court 1995 which is in pari materia with O 92 r 4.

[11] The Federal Court has held that the rule is part of procedural law and cannot be read to override substantive law. The rule stipulates that no provision in the Rules of the Federal Court 1995 should be construed as to limit or affect the inherent powers of the court to prevent injustice or to prevent an abuse of the process of the Federal Court. The rule is directed at the provisions of the Rules of the Federal Court 1995 (see *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201).

[12] The above interpretation would apply with equal force to O 92 r 4. The inherent power in O 92 r 4 is intended to prevent injustice or abuse of the process of the 'High Court'. The rule being part of procedural law cannot be read to override substantive law.

[13] With this background, I then undertook an analysis of the cases cited by the plaintiff in support of its argument and reached to the conclusion that the cases are either distinguishable or not relevant to the issue at hand.

[14] My reasons are as follows. In those cases, the inherent jurisdiction under O 92 r 4 was invoked to prevent injustice or abuse of the process of the High Court in proceedings before the High Court caused by the absence of express provision or a lacuna in the Rules of Court 2012.

[15] It was for this reason the High Court granted: an *ad interim* stay in *China Harbour Engineering Company Ltd v Lunar Shipping Agencies Sdn Bhd* [2016] MLJU 1252; [2016] 1 LNS 1393); a stay of proceedings pending the outcome of a certain event in *Ambank (M) Sdn Bhd v Metal Reclamation (Industries) Sdn Bhd & Ors* [2016] 10 CLJ 205; and allowed an application to be made to set aside a garnishee order obtained ex parte in *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445.

[16] In the present case the plaintiff is asking this court to stay the effect and enforcement of the ITA provisions which expressly provide for the recovery of tax. The stay sought will override substantive provisions of the ITA triggered by the non-payment of tax by the plaintiff. Thus, the inherent power sought is for all intent and purposes to override substantive law which is not within the ambit and scope of O 92 r 4.

[17] I found the following set of cases cited by the plaintiff not relevant and of no assistance to the contention put forth by the plaintiff:

(a) in *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; [1988] 1 CLJ Rep 384 the Ccourt had granted an interim injunction pursuant to s 50 of the Specific Relief Act 1950 which provision the learned judge said was a statutory confirmation of the inherent power of the court to

A restrain abuse of the process of the court. Thus, the interim injunction granted was to restrain a party from abusing the process of the High Court from filing a frivolous and vexatious winding up petition; and

(b) in *Klassik Tropika Development Sdn Bhd v Lembaga Rayuan Negeri Pulau* B *Pinang & Ors* [2016] MLJU 707 no stay was granted by the High Court. The question before the High Court was whether the decision of the Appeal Board of Penang which had granted an interim stay of the implementation of a planning permission should be quashed by certiorari in judicial review proceedings.

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[18] The next set of cases cited by the plaintiff was to show that the courts have granted stay in tax cases. The cases cited were *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 and *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 which was followed by the High Court in *Kerajaan Malaysia* D *v Raja a/l K Veerasamy* (2014) MSTC 30-074.

[19] A close scrutiny of *Chong Woo Yit* and *Jasanusa* revealed that in these cases the court had in the exercise of its appellate jurisdiction granted a stay of E execution of its own judgments. The judgments were given in favour of the government who had moved the court under s 106 of the ITA to recover tax as a debt owed to the government. It was at this stage that the relevant parties in those cases applied for a stay of execution of the judgments pending the disposal of the parties' appeal by the special commissioners. The Supreme F Court undoubtedly has inherent power under the rules of court to stay its own judgment in these circumstances.

[20] In *Government of Malaysia v Margaret Au Nyat Fah* [2007] MLJU 608; [2008] 3 CLJ 424 there was no application for a stay before the court and G neither was there an order of stay. The observations on the issue of stay were purely *obiter*.

[21] The following two cases are also distinguishable. In *Sibu Slipway Sdn Bhd v Yii Chee Ming & Ors and other appeals* [2017] 1 MLJ 368 the Court of H Appeal dismissed the appellant's appeal against a permanent stay of a winding up order but went on to vary the order of the High Court to one made under the inherent power of the court. The court did so on the ground that the winding up order was obtained by active concealment and suppression of material facts to frustrate or defeat pending actions in another court. The court I held that in such cases the High Court retained an inherent residuary power to intervene and remedy the wrong perpetrated by an abuse of the process of the High Court (see paras 27–28 and 30–33). The case is therefore, an example of how the court invokes its inherent power under O 92 r 4 to prevent an abuse its process.

[22] In *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705, the chargors applied by way of an ex parte originating summons and obtained an order of stay of the land administrator's order for sale of his property by public auction scheduled for the following day and for a fresh reserve price to be fixed on the grounds of abuse of process by the land administrator. The High Court, on the respective applications by the land administrator and successful bidder set aside the order of stay it made ex parte on the grounds the allegations of abuse of process on which the stay was granted were false. The Supreme Court dismissed the chargor's appeal and on the issue concerning the stay order made the following statement:

> ... apart from the Rules of the High Court 1980, the High Court has always that inherent jurisdiction to order a stay of proceedings to prevent any abuse of process. Further where a superior court of record such as the High Court and the courts above it, has the jurisdiction or discretion to decide any cause or matter by way of appeal, judicial review or otherwise, such superior court will have the inherently incidental power in any event to suspend the operation or execution of any order concerned in such cause or matter pending the decision of such court, but such power will be exercised according to the usual principles applicable thereto, or otherwise judicially, according to fair play and common sense.

[23] Thus, based on the above principle, the High Court has inherent power to suspend the operation or execution of any order made by an inferior court or tribunal pending the decision on the validity of the said order by the High Court. The other condition is that the cause or matter must be one that is within the High Court's jurisdiction.

[24] In my view, the principle in *Puah Bee Hong* does not apply in the present case as this court is not deciding the question of the validity of the assessments made in the impugned decision. If this court was seised with jurisdiction to make such determination, only then would the question of invoking the inherent power to order a stay of the decision under scrutiny would arise. As it is, the jurisdiction to decide on the validity of the impugned decision is that of the special commissioners.

[25] For the above reasons I dismiss the plaintiff's first point and which would therefore dispose of this originating summons.

Second point: Special circumstances warranting stay

[26] For completeness and in the event that this court does indeed possess the inherent power to grant such stay, I hold that the grounds advanced by the plaintiff do not amount to special circumstances warranting a stay of execution of the impugned decision.

[27] The grounds advanced by the plaintiff to show special circumstances are:

(a) the appeal has merits;

(b) since the assessment is arbitrary and incorrect it would be unjust for the plaintiff to pay the penalty provided under s 103 of the ITA;

(c) the appeal will be rendered nugatory and the substratum of the appeal destroyed as the sum of money to be paid will create a financial crisis and interfere with operations of plaintiff's business;

(d) the balance of convenience lies in favour of the plaintiff as in this situation only the plaintiff will be prejudiced and not the DGIR as the enforcement authority; and

(e) the DGIR will use its enforcement powers including barring its directors from leaving Malaysia under s 104 of the ITA which will be detrimental to the plaintiff's business.

[28] It is trite law that the principles governing the granting or otherwise of a stay is whether or not there are special circumstances warranting the court's exercise of its discretionary powers to grant a stay (*Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257).

[29] The merits of a case is not a relevant consideration in granting of stay (see *Kosma Palm Oil Mill* and the cases cited therein at paras 19–20, p 268). The allegation that the assessment is arbitrary and incorrect is for the special commissioners and concerns the merits of the case. These matters go to the validity and correctness of the decision and not towards the enforcement of the decision. It is therefore unnecessary for me to consider the merits of the plaintiff's case in respect of the application before me.

[30] The plaintiff then says that it will suffer irreparable damage and be irremediably injured as the large amount of tax imposed on the plaintiff will result in financial crisis, cash flow problems, operational disruptions to its business and consequently damage to its reputation amongst financial

institutions. The plaintiff further states that the DGIR will bar its directors from leaving the country and this would exacerbate the damage caused to its business.

[31] It has been held that the hardship that arises from the inability to pay do not amount to 'special circumstances'. The hardship advanced by the plaintiff is nothing unusual. Special circumstances must be special and which must go to the execution of an order. Ordinary or usual circumstances are insufficient (see *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; and *Federal Commissioner of Taxation v Palumbo* (1992) 92 ATC 4358).

[32] The plaintiff has highlighted the problems that it will encounter if the stay is not granted. These problems form the usual hardships encountered by taxpayers. In *Kosma Palm Oil* (at para [24] pp 269–270) it was shown that if the stay was not granted the applicant company would face ruin. On this issue the Federal Court held that:

> This line of reasoning militates against the rationale that a stay is granted only for reasons that relate to the enforcement of the judgment. It is not granted to give the unsuccessful party time to satisfy the judgment or to alleviate his problems.

[33] In this case, the entity in respect of whom the tax is being collected is the Government of Malaysia ('the government'). There is therefore no danger of the plaintiff not being repaid if it is successful in its appeal. The tax regime applies to all taxpayers alike and if grounds of hardship are a reason to grant a stay then the tax regime and the collection of tax would be disrupted and would be against the interests of the public at large.

[34] In the circumstances, the plaintiff has failed to furnish any valid ground that warrants the granting of stay and the question of balance of interest does not arise.

[35] In the upshot, it is my view that the plaintiff has not succeeded in establishing the existence of special circumstances in support of the application which must therefore be dismissed with costs.

Third point: Interim injunction against the DGIR

[36] The injunction as framed is to restrain the DGIR from enforcing the decision which in effect is to restrain the DGIR from recovering the tax due and payable in the event of default by the plaintiff.

A **[37]** In order to restrain the DGIR it must be shown that he is empowered to recover the tax due and payable pursuant to the impugned decision. The provisions of the ITA in relation to the recovery of the tax identified in the present case are ss 75A, 103–104 and 106.

B **[38]** I find that the DGIR has no role whatsoever in the recovery modes provided in ss 75A, 103 and 106 and for this reason no order can be made restraining him when he is a stranger to the recovery process under these provisions.

C **[39]** The enforcement under s 103 is to encourage taxpayers to pay up or face the automatic imposition of penalties for non-payment or late payment. The penalty is imposed by operation of law. The enforcement under s 75A is to encourage payment of the tax by a company for otherwise the provision makes
D the directors of that company jointly and severally liable to pay the tax of the company. The liability of such director is again by operation of law. The enforcement under s 106 is by the government and not the DGIR. The government is empowered to recover the tax by civil proceedings as a debt due to the government. In the circumstances the order to restrain the DGIR in
E respect of the above provisions are misconceived.

[40] The only provision under which the DGIR can act for enforcing the impugned decision is under s 104. The DGIR is empowered to issue a certificate to the relevant authorities to prevent a person from leaving Malaysia,
F if he is of the opinion, that the said person is about or likely to leave Malaysia without paying his taxes. This provision could be invoked against a director of the plaintiff provided that all prerequisites in the provision are satisfied.

G **[41]** There is no evidence shown other than a bare statement that the DGIR will utilise the provision to bar the directors of the plaintiff from leaving Malaysia.

[42] In this context there is another hurdle the plaintiff has to overcome. The
H DGIR is carrying out enforcement powers and must be allowed to carry out his statutory functions if the conditions of the provision are satisfied. To so restrain the DGIR who is an agent of the government would in effect be an act of restraining the government from its statutory duty of recovering tax. It would be against the interest of the public if a public authority is restrained from
I enforcing the power conferred to him by s 104 of the ITA.

[43] I am also of the considered view that the DGIR and by extension the government cannot be restrained by an interim injunction in view of the provisions of s 29 of the Government Proceedings Act 1956.

[44] In our country tax is authorised by the Legislature and collected by the government. In 1995 the Inland Revenue Board of Malaysia ('the Board') was established pursuant to the Inland Revenue Board of Malaysia Act 1995. The Board is an agent of the government to collect and enforce the payment of taxes. The chief executive officer of the Board is by statutory provisions also the DGIR.

[45] In respect of legal proceedings, the Inland Revenue Board of Malaysia Act 1995 clearly states in s 29 as follows:

(a) no action or legal proceedings shall be brought against the Board in respect of any matter relating to any tax for which the Board is acting as agent of the government; and

(b) any action or legal proceedings in respect of any matter relating to tax shall be instituted by or against the government.

[46] Therefore, any action or legal proceedings for the recovery of tax must be brought against the government.

[47] The government cannot be restrained by an injunction interim or otherwise by virtue of sub-s (1) of 29 of the Government Proceedings Act 1956 which states as follows:

> In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) ...

[48] Thus, the government through its agent, the DGIR, cannot be restrained from exercising the power under s 106 of the ITA to recover tax.

[49] The plaintiff has cited the case of *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325 for the proposition that interim injunctions can be made against the government. However subsequent cases of the Court of Appeal have held otherwise.

[50] In *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751 and *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676 the court has held that no interim injunction can be granted against the government under sub-s (1) of s 29 of the Government Proceedings Act 1956.

[51] In the face of conflicting decisions of the Court of Appeal, I respectfully follow the later decisions of *Kuching Waterfront* and *Tan Bun Teet*.

[52] The DGIR is an agent of the government expressly authorised to carry out the function under s 104 to recover tax for the government. To restrain an agent would be an act restraining the principal. Therefore, to restrain the DGIR is an act of restraining the government from recovering tax as provided by s 104 of the ITA.

[53] For the above reasons, I dismiss the prayer to restrain the DGIR as sought.

[54] Further, I have also consideration the issue of balance of convenience. I have perused the submissions of the parties and arrived at the conclusion that the balance lies with the enforcement authority.

[55] In assessing where the balance of convenience lies, the interest of the public may rightly be taken into consideration (see *Smith and others v Inner London Education Authority* [1978] 1 All ER 411). In *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133 the Court of Appeal stated as follows:

> I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

[56] The function of the DGIR and/or the government is ultimately in the public interest. Tax is collected and used for the public benefit. If the injunction is granted it would cause disruption in the recovery of taxes. It is therefore not in the public interest that such a disruption should occur.

CONCLUSION

[57] For the above reasons the originating summons is dismiss with costs.

Application dismissed with costs.

Reported by Mohd Kamarul Anwar